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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

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| SAWABEH INTERNATIONAL GROUP,<br>Plaintiff and Appellant,<br>v.<br>GENESISTP, INC., et al.,<br>Defendants and Respondents. | A151443<br><br>(Sonoma County<br>Super. Ct. No. SCV-258675) |

Sawabeh International Group (Sawabeh) sued defendants many years after a proposed business deal between Sawabeh and defendant GenesisTP, Inc. (GTP) failed. The trial court found the statutes of limitations barred Sawabeh's first amended complaint and entered judgments in favor of defendants. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Sawabeh entered into a license and services agreement with GTP in June 2008. Under the agreement, Sawabeh would license GTP's cold-formed steel technology, purchase the equipment necessary to manufacture cold-formed steel from GTP, and construct manufacturing plants in Saudi Arabia and Bahrain. The agreement required Sawabeh to operate at least three plants to fabricate and assemble products and specified that the deadline to make the first plant operational was July 1, 2009.

On January 26, 2009, after GTP had demanded that Sawabeh pay an initial equipment fee by the agreement's January 25, 2009 deadline, Sawabeh informed GTP in a phone call that it was facing challenges in getting the first plant operational due to

Saudi Arabian regulations. In the same call, GTP acknowledged that it was having cash flow problems and pressed Sawabeh to contribute a cash down payment under the guise of an initial equipment fee payment.

The parties continued discussions regarding the first plant's operational deadline and payment of the initial equipment fee. In March 2009, Sawabeh informed GTP that regulatory delays would push back the first plant's operational deadline to October 2009. Sawabeh also told GTP that some of its potential investors were apprehensive due to the pressure GTP was placing on Sawabeh for immediate payment of the equipment fee—which made GTP seem desperate for liquidity. At GTP's continued request, Sawabeh sent partial payment for the equipment fee. By July 2009, Sawabeh had paid GTP $809,925 (in both Canadian and American currency) under the agreement.

On August 18, 2009, GTP unilaterally terminated the agreement, citing disappointment with the parties' working relationship. On September 16, 2009, Sawabeh informed GTP that any delays encountered because of Saudi Arabian regulations were excused under the agreement. Sawabeh advised GTP in writing that GTP had suffered no harm from the delays, yet it had "suddenly decided to conveniently abandon the Saudi market and back off from your [GTP's] commitments after you have gotten overpaid and easily blame it on us." Sawabeh demanded that GTP repay Sawabeh with interest and stated that if GTP failed to do so, it would exercise all of its rights and remedies. GTP did not respond or return Sawabeh's money.

Sawabeh learned, in March 2011, that defendant Codding Steel Frame Solutions, Inc. (CSFS) had assumed control and management of GTP and was GTP's successor in interest. After Sawabeh attempted to contact former GTP officers on LinkedIn, Sawabeh received a response from CSFS's chief operating officer and former GTP officer, defendant Roger Moore. Sawabeh requested a meeting with defendant Richard Pope, a former GTP officer, and Moore e-mailed that he would be in touch regarding how the companies could proceed.

Thereafter, on March 8, 2011, Moore sent the following e-mail message to Sawabeh: "[T]he new Genesis management met yesterday and we will be drafting an

addendum to the License and Services Agreement between our companies updating the [operation deadline] dates and indicating the sums already paid by your company . . . ." On April 12, 2011, Moore sent Sawabeh an e-mail which failed to address Sawabeh's request for return of its $809,925 and, instead, proposed an amendment to the original agreement. In a separate e-mail sent by Moore to Sawabeh that month, Moore stated that Genesis Worldwide was interested in pursuing the relationship and would like to discuss.

J.R. Gunter, the executive director of sales and marketing of Genesis Worldwide, GTP's parent company, next e-mailed Sawabeh. Gunter explained Moore had assigned him to assist in the agreement's reactivation and the subsequent opening of a fabrication plant in Saudi Arabia; he said "[b]ecause of the recent inquiries we [GW and CSFS] have received from others in Saudi Arabia, it appears this would be an excellent time to build a relationship with you and your company." (Second bracketed insertion added.) On July 19, 2011, Gunter e-mailed Sawabeh stating Genesis Worldwide and CSFS were "committed to your success and with [*sic*] to form a long term relationship with you." This was the last Sawabeh received from these defendants. Thereafter, all communications between the parties ceased.

After communications broke off, Sawabeh began extensive searches for defendants in late 2011.[1] After repeated attempts to put the agreement back on track or to recoup its investment, in 2014 Sawabeh learned that GTP had shared possession of the technology with six entities: defendants Genesis Worldwide; Genesis Steel Frame Solutions, L.P.; CSFS; Codding Investments, Inc.; Codding Enterprises, L.P.; and SOMO Village, LLC. It also learned CSFS and GTP had entered into a joint venture involving the technology. Sawabeh immediately attempted to contact these entities to demand repayment of its investment. In early 2015, a representative of Sawabeh spoke to defendant Brad Baker, an officer of Codding Enterprises, and demanded that Codding

[1] We disregard the 2012 date upon which the first amended complaint implies the search began where Sawabeh's original complaint specifically alleges it began this search in late 2011. (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 602, fn. 6; see also *People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957.)

Enterprises repay the fee Sawabeh had advanced or execute an amendment to the agreement. Baker stated he had no knowledge of GTP or the agreement referred to by Sawabeh.

On July 6, 2015, Sawabeh filed a complaint against defendants GTP and Genesis Worldwide (the GTP defendants) and defendants CSFS, Codding Investments, Inc., Codding Enterprises, L.P., Sonoma Mountain Village, LLC, Genesis Steel Frame Solutions, L.P., Roger Moore, Richard Pope, Wil Lindgren, J.R. Gunter, Brad Baker, and Lisa B. Codding (the Codding defendants). The operative first amended complaint includes causes of action for fraud, fraudulent concealment, conspiracy to commit fraud, quantum meruit, money had and received, unjust enrichment, and conversion.[2] The GTP defendants demurred to the first amended complaint, as did the Codding defendants. The court found Sawabeh's claims were time-barred and sustained the demurrers without leave to amend. The court entered judgment for the GTP defendants and subsequently entered judgment for the Codding defendants.[3] Sawabeh appealed.

## DISCUSSION

The rules governing our review of the trial court's ruling on demurrer are well settled. We review de novo an order sustaining a demurrer and exercise our independent judgment to determine whether the complaint "state[s] a cause of action on any available legal theory." (*Brown v. Deutsche Bank National Trust Co.* (2016) 247 Cal.App.4th 275, 279.) We accept the truth of all well-pleaded allegations in the complaint but not that of

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[2] The operative first amended complaint names SOMO Village, LLC instead of Sonoma Mountain Village, LLC.

[3] Pursuant to the Codding defendants' motion, we take judicial notice of the March 30, 2017 judgment entered in their favor and the May 30, 2017 notice of entry of judgment. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).) Presumably unaware of the March 30, 2017 judgment, Sawabeh filed a May 22, 2017 notice of appeal to the judgment for the GTP defendants and the court's order sustaining the Codding defendants' demurrer without leave to amend. Because a judgment has been entered for the Codding defendants, we liberally construe the appeal to have been taken from the judgment. (See *Los Altos Golf & Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198, 202; California Rules of Court, rule 8.100(a)(2).)

" ' "contentions, deductions or conclusions of fact or law." ' " (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) Further, because the demurrer at issue is to an amended complaint, we may properly consider allegations asserted in the prior complaint: " ' "A plaintiff may not discard factual allegations of a prior complaint, or avoid them by contradictory averments, in a superseding, amended pleading." [Citation.]' " (*People ex rel. Gallegos v. Pacific Lumber Co.*, *supra*, 158 Cal.App.4th at p. 957.)

When the trial court sustains a demurrer without leave to amend, we review the determination that amendment could not cure the defects in the complaint for abuse of discretion. (*Brown v. Deutsche Bank National Trust Co.*, *supra*, 247 Cal.App.4th at p. 279.) We reverse only if the plaintiff bears his or her burden of establishing a reasonable possibility that the defects could be cured by amendment. (*Ibid*.)

*I. The Statutes of Limitations Bar Sawabeh's Claims*

As stated above, Sawabeh asserts seven causes of action in its first amended complaint. The causes of action asserted are subject to various statutes of limitations, none greater than three years.[4] We review Sawabeh's contentions on appeal under well-settled legal standards. The statute of limitations usually commences when a cause of action " 'accrues,' and it is generally said that 'an action accrues on the date of injury.' [Citation.]" (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 931 (*Bernson*).) Sawabeh does not address the accrual date for any of its causes of action, but it is apparent they all arise out of the same harm: Sawabeh's loss of $809,925. Based on Sawabeh's allegations, it was aware of this harm no later than September 16, 2009, when it sent a letter demanding return of its money. Sawabeh did not file its complaint until

[4] Sawabeh's claims for fraud, fraudulent concealment, conspiracy to commit fraud, and its claims for unjust enrichment and money had and received based on fraud, are governed by a three-year statute of limitations. (See Code Civ. Proc., § 338, subd. (d); *First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1670 [common count for money had and received based on fraud is governed by Code Civ. Proc., § 338, subd. (d)].) Conversion has a three-year statute of limitations, and a claim for quantum meruit has a two-year statute of limitations. (Code Civ. Proc., § 338, subd. (c); *Vishva Dev, M.D., Inc. v. Blue Shield of California Life & Health Ins. Co.* (2016) 2 Cal.App.5th 1218, 1223.)

July 6, 2015, long after the statutes of limitations governing all of its claims had expired. Thus, in recognition of the fact that its claims are statutorily time-barred, Sawabeh relies on several equitable doctrines carved out by California courts to resuscitate its claims.

First, Sawabeh argues that defendants fraudulently concealed their identities and the facts giving rise to Sawabeh's claims against them. Second, Sawabeh argues all defendants should be equitably estopped from asserting the statutes of limitations. We turn now to examine each of Sawabeh's contentions below.

*A. Fraudulent Concealment*

Under the traditional rule of fraudulent concealment, a " 'defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations . . . .' " (*Bernson*, *supra*, 7 Cal.4th at p. 931.) "When a plaintiff alleges the fraudulent concealment of a cause of action, the same pleading and proof is required as in fraud cases . . . . [Citation.]" (*Community Cause v. Boatwright* (1981) 124 Cal.App.3d 888, 900.) The complaint must allege: (1) when the fraud was discovered; (2) the circumstances under which it was discovered; and (3) that the plaintiff was not at fault for failing to discover it or had no actual or presumptive knowledge of facts sufficient to put plaintiff on inquiry. (*Ibid*.)

The fraudulent concealment doctrine " 'does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim.' " (*Rita M. v. Roman Catholic Archbishop* (1986) 187 Cal.App.3d 1453, 1460.) " 'It has long been established that the defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations, but only for that period during which the claim is undiscovered by plaintiff or until such time as plaintiff, by the exercise of reasonable diligence, should have discovered it.' [Citation.]" (*Bernson*, *supra*, 7 Cal.4th at p. 931.) A plaintiff is under a duty to reasonably investigate, and a suspicion of wrongdoing coupled with knowledge of harm commences the limitations period. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111–1112.)

Furthermore, although ignorance of a defendant's identity does not toll the statute of limitations, in *Bernson*, the Supreme Court ruled that a defendant may be estopped

from asserting the defense where the defendant's intentional concealment precludes the plaintiff from discovering the defendant's identity. (*Bernson, supra,* 7 Cal.4th at p. 937.) To avail itself of this equitable doctrine, however, the plaintiff must exercise reasonable diligence. (*Id.* at p. 936.) And, in resolving the question of whether a plaintiff acted with reasonable diligence, a court must consider if the filing of a Doe complaint would have facilitated discovery of the defendant's identity. (*Id.* at p. 937.) For example, "[w]here the identity of at least one defendant is known . . . , the plaintiff *must* avail himself of the opportunity to file a timely complaint naming Doe defendants and take discovery." (*Ibid.*, italics added.) Moreover, our Supreme Court has emphasized that this rule would not affect the vast majority of cases as it would be a "rare and exceptional case in which the plaintiff could genuinely claim that he [or she] was aware of no defendants, and even more rare that, given knowledge of at least one, [plaintiff] could not readily discover the remainder through the filing of a Doe complaint and the normal discovery processes." (*Ibid.*)

Here, Sawabeh contends defendants concealed their identities and the causes of action against them in two ways: (1) by failing to disclose the GTP/CSFS joint venture and that certain defendants shared ownership of the technology; and (2) through defendant Moore's statement in 2011 that new Genesis management met and would draft an addendum to the parties' agreement. Before it learned of the joint venture and shared ownership in 2014, Sawabeh argues it only knew of its breach of contract claim against GTP. Defendants contend the doctrine of fraudulent concealment does not apply because Sawabeh was on notice of its claims by September 16, 2009, or by July 2011 at the latest, and it failed to diligently file a Doe complaint to discover the identities of unknown defendants. We agree with defendants.

We first address Sawabeh's claims against GTP. Initially we note that while Sawabeh argues the fraudulent concealment applies to all of its claims, it omits any discussion as to how the doctrine applies to GTP. Our review of Sawabeh's complaint also fails to elucidate the necessary factual averments to plead fraudulent concealment. For example, Sawabeh alleges that, in order to induce the agreement's execution, GTP

falsely represented that it "would license to Plaintiff its cold-press steeled technology" and that GTP "was a legitimate, solvent company." Sawabeh also alleges that GTP "concealed [its] financial condition," as well as concealed its "true motive to abscond with Plaintiff's funds . . . ." Sawabeh's remaining claims assert liability arising from GTP's improper taking and retention of Sawabeh's money. The doctrine of fraudulent concealment does not save these claims because, as we explain more fully below, Sawabeh knew of GTP's identity and was on inquiry notice of its claims against GTP by September 16, 2009.

In early 2009, GTP disclosed it had cash flow problems, and by March 2009, GTP's desperation for liquidity had scared off Sawabeh's potential investors. GTP terminated the parties' agreement in August 2009, and on September 16, 2009, Sawabeh demanded its money back and threatened to sue. Sawabeh's allegations also show that it was suspicious about the basis for GTP's abrupt termination. Sawabeh voiced this suspicion in its September 16, 2009 letter to GTP where it commented that GTP had expended no money, yet " 'suddenly [had] decided to conveniently abandon the Saudi market and back off from [its] commitments after [it was] overpaid . . . .' " GTP did not respond to Sawabeh's September 16, 2009 letter or return the money. Thus, by September of 2009, Sawabeh knew or had reason to know that GTP made false representations regarding its solvency and its intent to license the technology, knew its money had been improperly taken, and suspected wrongdoing by GTP. At this point, the statutes of limitations on Sawabeh's claims began accruing.

In addition, Sawabeh acknowledges in its pleading that it suspected fraud in its dealings with GTP in 2011 just after communications with defendants Moore and Gunter restarted, at which point Sawabeh pleaded it "remained hopeful . . . that Plaintiff's $800,000 investment had not been sunk into a fraudulent enterprise." By the time Sawabeh sued on July 6, 2015, the statutes of limitations on its claims against GTP had run.

We also conclude that the fraudulent concealment doctrine fails to save Sawabeh's claims against the remaining defendants. First, Sawabeh has not met its burden of

pleading fraudulent concealment. Although Sawabeh generally alleges it discovered the fraudulent concealment in 2014, it improperly fails to allege exactly when this discovery occurred or the circumstances under which the discovery was made. (See *Community Cause v. Boatwright*, *supra*, 124 Cal.App.3d at p. 900.)

Second, even if Sawabeh's complaint met the basic pleading requirements for fraudulent concealment, it cannot establish the diligence required by *Bernson*. Specifically, Sawabeh failed to allege, as it must, that timely filing of a Doe complaint would not have facilitated identification of the defendants. As previously stated, Sawabeh was on notice of its claims against GTP by September 16, 2009. By March 2011, Sawabeh knew that defendants Moore, Pope and Gunter worked for Genesis Worldwide and CSFS and that CSFS had assumed management and control of GTP as a successor in interest.

When contact with these defendants broke off after July 19, 2011, Sawabeh also knew they had not fulfilled promises to reengage under the agreement and had refused to return Sawabeh's money. Given that Sawabeh was able to identify many defendants without the aid of discovery, Sawabeh failure to allege or explain why the timely filing of a Doe complaint and subsequent discovery could not have revealed the identities of the defendants and their intertwined business relationships.

*B. Equitable Estoppel*

Sawabeh argues all defendants should be equitably estopped from asserting the statutes of limitations because defendants Moore and Gunter, acting for CSFS and Genesis Worldwide, made statements between March 8, 2011, and July 19, 2011, that led Sawabeh to believe the agreement would be performed and to refrain from suit. But Sawabeh does not adequately allege equitable estoppel.

Under the doctrine of equitable estoppel, a defendant will be estopped to assert the statute of limitations if the defendant's conduct, relied on by the plaintiff, has induced the plaintiff to postpone filing the action until after the statute has run. (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 652.) There are four basic elements to equitable estoppel: (1) the party to be estopped must have known the facts; (2) the party to be estopped must

have intended that its conduct would be acted upon, or it must have acted so as to have given the party asserting estoppel the right to believe that it was so intended; (3) the party asserting estoppel must have been ignorant of the true state of facts; and (4) the party asserting estoppel must have reasonably relied on the conduct to its injury. (*Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1261.) Once it is determined that the elements of an estoppel have been sufficiently pleaded, the question of whether the statute of limitations is tolled by the defendant's conduct is one of fact which should be left for resolution by a jury. (*Muraoka v. Budget Rent-A-Car, Inc.* (1984) 160 Cal.App.3d 107, 117.) However, where the complaint pleads undisputed facts establishing that equitable estoppel does not apply, the issue may be resolved on demurrer. (See *Cal. Cigarette Concessions v. City of L. A.* (1960) 53 Cal.2d 865, 868 ["When . . . the facts are undisputed, the existence of an estoppel is a question of law"].)

As a preliminary matter, Sawabeh does not explain how statements made by Moore and Gunter in their representative capacities for CSFS and Genesis Worldwide could equitably estop all defendants. Even assuming they could, Sawabeh's allegations clearly reflect that it did not rely on Moore's or Gunter's 2011 statements that the agreement would be performed. After Moore sent Sawabeh reengagement e-mails in March 2011, Sawabeh demanded the return of its money. After communications ceased on July 19, 2011, Sawabeh began looking for defendants in late 2011 and for any entity that would resume performance under the agreement *or* return Sawabeh's money. In 2014, after learning some defendants shared possession of the technology, Sawabeh immediately tried to find them to demand repayment. Although Sawabeh generally alleges that it relied on the 2011 statements the agreement would be performed, its specific allegations regarding its repeated demands for repayment refute its general allegations. (See *Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1235–1236 [specific allegations control inconsistent general allegations].) Sawabeh accordingly cannot invoke equitable estoppel. (See *Mills, supra,* 108 Cal.App.4th at pp. 655–656 [estoppel stopped operating where uncontroverted facts established plaintiffs ceased relying on defendant's promises].)

Equitable estoppel also does not bar defendants from asserting a statute of limitations defense for yet another reason: Sawabeh did not sue in an appropriate time after the alleged estoppel had terminated. A plaintiff asserting equitable estoppel has only a "reasonable time in which to bring his action after the estoppel has expired." (*Regus v. Schartkoff* (1957) 156 Cal.App.2d 382, 387 (*Regus*).) When a substantial period passes after expiration of the delay engendered by a party, his conduct, representations, or promises will not estop him from asserting the statute of limitations. (*Ibid.*) The "reasonable time" within which a plaintiff may sue cannot exceed the period of limitation imposed by the statute for commencing the action. (*Ibid.*) Applying these principles, the court in *Regus* affirmed a judgment sustaining a demurrer without leave to amend where a one-year statute of limitations applied to plaintiff's claim and she filed suit nearly two years after learning of the falsity of the representations underlying the estoppel. (*Ibid*.)

Sawabeh contends the question of what a "reasonable time" is within which to sue after the estoppel expires is always factual, but where, as here, uncontroverted facts show this time exceeds the applicable statute of limitations period, the determination may be made on demurrer. (*Regus, supra*, 156 Cal.App.2d at p. 387.) The last statement CSFS and Genesis Worldwide made potentially suggesting they would perform the agreement occurred on July 19, 2011, and Sawabeh thereafter began efforts to recoup its investment. By late 2011, Sawabeh knew CSFS and Genesis Worldwide would not perform as promised earlier that year, and it did not sue until July 2015. Because the longest statute of limitations applicable to Sawabeh's claims is three years, *Regus* bars Sawabeh's suit.

*II. Leave to Amend*

To establish entitlement to leave to amend, Sawabeh had to demonstrate a reasonable probability that it could cure the defects in its pleading. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) Sawabeh made no such showing to the trial court. On appeal, Sawabeh contends it can amend its complaint to state more clearly that "until [Sawabeh] learned of the shared Technology in 2014, [it] did not know that [it] had been misled by defendants in 2011 to believe that only GenesisTP and Genesis

Worldwide could supply the Technology, and that the Corporate Defendants were motivated to help GenesisTP steal Sawabeh's money[.]" But, Sawabeh's first amended complaint contains similar allegations, and, more importantly, Sawabeh has failed to set forth any reasonable basis from which we could conclude it could overcome the deficiencies noted in its pleading. The trial court properly exercised its discretion when it sustained demurrers to the first amended complaint without leave to amend.

## DISPOSITION

The judgments are affirmed. Respondents shall recover their costs on appeal.

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Wiseman, J.*

WE CONCUR:

_____
Fujisaki, Acting P. J.

_____
Petrou, J.

A151443/*Sawabeh Internat. Group v. GenesisTP, Inc.*

* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.